

EXCELLENT ADVOCACY OR FRIVOLOUS ARGUMENT

COURSE SUPPLEMENTAL MATERIALS

VIDEO 1: DISCUSSION POINTS

- What is required of an attorney to show competent representation?
 - Rule 4-1.1: “A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”
- Should the attorney for the Defendant proceed with the motion argument? Is it a frivolous argument?
 - Florida Rule of Civil Procedure 1.190(a) provides:
Amendments. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, may so amend it at any time within 20 days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion. Leave of court shall be given freely when justice so requires. A party shall plead in response to an amended pleading within 10 days after service of the amended pleading unless the court otherwise orders.
 - The trial court has discretion to give leave to amend before filing of an answer, but Rule 1.190(a) allows an amendment once as matter of course before a responsive pleading.
- What do the Rules of Professional Conduct say about bringing frivolous claims or defenses?
 - Rule 4-3.1 Meritorious Claims and Contentions: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”

Authorities: Rule 4-1.1; Rule 4-3.1; *Forum v. Boca Burger, Inc.*, 912 So.2d 561 (Fla. 2005); *Forum v. Boca Burger, Inc.*, 788 So. 2d 1055 (Fla. 4th DCA 2001).



VIDEO 2: DISCUSSION POINTS

- Was proceeding with the motion to dismiss or any of the hearing argument frivolous?
 - Yes. The motion to dismiss the original complaint was moot once the amended complaint was filed and served. The attorney should have canceled the hearing and refrained from several of the arguments made during the hearing. Competence under Rule 4-1.1 includes knowledge and preparation. A plain reading of the applicable rule of procedure should have led the attorney to realize that the pleading amendment was permitted once as a matter of course and this was not a question of the court’s discretion. Had the attorney been uncertain as to whether a motion to dismiss might be considered a “responsive pleading,” research and preparation would have quickly resolved that question. Existing Florida Supreme Court precedent has established “that the plain language of the rule grants trial courts no such discretion” to deny a plaintiff’s first amendment before a responsive pleading is served. *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 566 (2005).

- Did the defense counsel mislead the judge?
 - It’s unclear whether defense counsel was aware of the binding Supreme Court precedent in *Boca Burger* when he made his argument to the trial judge. If he did know, his failure to inform the Court of binding precedent directly adverse to his position ultimately misled the judge.

- What about defense counsel citing to persuasive precedent from a Federal district court that supported his position? Any problem with him doing that?
 - Lawyers are to avidly advocate for their clients and are permitted to present good-faith arguments to change existing law. However, in doing so, a lawyer must disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Rule 4-3.3(a)(3).

- Do you think the defense counsel’s conduct violated any of the Rules Regulating the Florida Bar? Let’s go through a few of the rules to see.
 - Rule 4-1.1 Competence
A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.



- Rule 4-3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Authorities: Rule 4-1.1; Rule 4-3.1; Rule 4-3.3(a)(3); *Forum v. Boca Burger, Inc.*, 912 So.2d 561 (Fla. 2005); *Forum v. Boca Burger, Inc.*, 788 So. 2d 1055 (Fla. 4th DCA 2001); Fla. Stat. §57.105; Florida Bar [Professionalism Expectations](#) 2.2, 2.10, & 4.13.

VIDEO 3: DISCUSSION POINTS

The attorney partner in the scene told the associate that he knew of well-settled case law against the ruling the judge gave in his client's favor.

- What are your thoughts about the partner's comments regarding the award of sanctions against plaintiff ("When I made that argument, I didn't actually think the judge would order sanctions, but I'm glad she did.")?
- Should an attorney defend a trial court order on appeal on the sole assumption that a trial court's order is "presumptively correct"?
 - No. In *Boca Burger*, the Florida Supreme Court held that district courts of appeal may "impose sanctions for counsel's defense of a patently erroneous order." *Boca Burger*, 912 So. 2d at 569. In *Boca Burger*, the Florida Supreme Court stated: "allowing appellate courts to impose sanctions on appellees for frivolous defense of trial court orders will not chill representation, but instead emphasize . . . counsels' obligations as officers of the court." *Boca Burger*, 912 So. 2d at 569.
- Is there anything problematic with the attorney here choosing to defend the court's ruling on appeal when the partner acknowledged "well-settled law" that speaks against the judge's ruling?
 - Yes. At this point, it is clear that defense counsel is aware of law that is adverse to his client's position. He has no plan to affirmatively disclose that adverse authority to the appellate court either ("maybe the other side will do a poor job with their brief or the court of appeal won't look too hard").



Video 3: Discussion Points Continue. . .

- Attorneys have a duty of candor towards the tribunal.
 - Rule 4-3.3 Candor to The Tribunal
 - (a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:
 - ...
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel...

The duty of candor to the tribunal requires that a “lawyer shall not knowingly make a false statement of fact or law to a tribunal **or fail to correct** a false statement of material fact or law previously made to the tribunal by the lawyer.” Rule 4-3.3(a) (emphasis added).

- Attorneys may, however, argue for an extension of existing law so long as they have a good-faith basis to do so. The standard embodied in Rule 4-3.1, requiring a good-faith argument for the extension, modification, or reversal of existing law, can encompass innovative theories. In doing so, attorneys are required to advise the court of any law contrary to the attorney’s position.
 - Rule 4-3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.